United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

325

REPLY BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22, 590

UNITED STATES OF AMERICA,

Appellee

v.

JESSIE ESSEX,

Appellant

FORMA PAUPERIS APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

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SUMMARY OF REPLY

In its brief the Government raises four principal arguments:

1. The identification of the Appellant by the Complainant at the scene of the assault was conducted in a proper manner and was not unnecessarily suggestive.

2. The Complainant's in-court identification of the Appellant as his assailant was grounded in a source independent of any observations made during the showup.

3. The admission of testimony by arresting officers concerning statements of certain witnesses to the assault does not afford grounds for reversal.

4. The evidence submitted at trial fully sustains a verdict of guilty.

REPLY ARGUMENT

I

The Government in its brief stresses at great length that, as a general rule, an on-the-scene identification as a valid police investigative practice does

not diverge from the principles of fundamental fairness.[1] Indeed, the Appellant does not contest this general principle but emphasizes the point, which this Court has recognized, that on-the-scene identifications may be conducted in such a way as to violate the suspect's Fifth Amendment rights.[2]

This Court, in Bates v. United States,[3] has stated that "prudent police work would confine these on-the-spot identifications to situations in which possible doubts as to identification needed to be resolved promptly; absent such need the conventional line-up viewing is the appropriate procedure."[4] In the instant case, the Complainant was not in danger of death as in Stovall v. Denno,[5] nor was the suspect still at large as in Simmons v. United

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1/ Wise v. United States, 127 U.S. App. D.C. 279, 383 F. 2d 206 (1967); Russell v. United States, D.C. Cir., No. 21,571, January 24, 1969.

2/ Wise v. United States, 127 U.S. App. D.C. 279, 383 F. 2d 206 (1967).

3/ ___ U.S. App. D.C. ___, 405 F. 2d 1104 (1968).

4/ Id. at 1106.

5/ 388 U.S. 293 (1967).

States.[6] In view of the circumstances surrounding the identification, there was no compelling necessity to present the Appellant to the Complainant at the scene of the assault.

The Government argues that in the instant case, the circumstances surrounding the confrontation were not unnecessarily suggestive and conducive to irreparable mistaken identification. This Court has recognized that proof of infirmities and subjective factors, such as hysteria of a witness, may be prejudicial.[7] The Government has attempted to limit the scope of subjective factors which can be analyzed to those which indicate an extreme emotional state. There is no basis in Bates v. United States to support that argument. Any factor which may prejudice the identification should be subject to analysis.

As the record in the instant case clearly indicates, the Complainant was badly beaten, bruised and bloody about the face. Officer Henry, who testified at the trial, aptly described the Complainant's condition by stating he looked in real bad shape.[8] In fact, he

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6/ 390 U.S. 377 (1968).

7/ Bates v. United States, supra, note 3 at 1106.

8/ Tr. p. 24, 54, 71.

had just finished a deadly struggle for his life. In this condition, the Complainant confronted the Appellant who himself was injured due to a struggle with the police and their dogs during the course of the arrest.[9/]

These circumstances by their very nature would present an opportunity and an inducement for mistaken identification. No one really knows what the police said at the time of the identification. The Complainant, because of his physical condition, was quite willing to accept the fact that since the police had caught someone who attempted to prevent the arrest, then that suspect must have been his assailant. Therefore, the circumstances surrounding the attack on the Complainant and the arrest of the Appellant necessitated the postponement of identification until the usual appropriate procedure of the conventional line-up could be arranged.

II

The Government claims that even if the on-the-scene identification of the Appellant by the Complainant was improper, the in-court identification was proper because

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9/ Tr. p. 54, 68.

it was grounded in observations not connected with the on-the-scene confrontation. As stated in the Appellant's brief, essential to the determination of whether the in-court identification was tainted because of the improper out-of-court identification is whether there was an independent source for the in-court identification. The crucial question then is whether the witness had an adequate opportunity to observe the facts leading to the in-court identification.[10/]

From a review of the record, it is quite evident that the only characteristic about his assailant that the Complainant could remember, outside of the relatively unimportant fact that he wore a brown suit, was that the assailant's ears pointed up slightly.[11/] It is difficult to contemplate that anyone, after two years from the time of an assault, could identify his assailant because of a slight variation in the assailant's ears. The assailant may have had slightly peculiar ears, but to say that this should be the major basis of a positive in-court

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10/ Clemens v. United States, D.C. Cir., No. 19,846, decided December 6, 1968.

11/ Tr. p. 18, 34. The Complainant stated: "The reason I identified him next morning, also when they showed me to him, is because I recognized the ears, that's correct." Tr. p. 34.

identification two years later is hard to justify.

Moreover, it is questionable whether the Complainant had an adequate opportunity to observe his assailant. The Complainant testified, as the Government's brief emphasizes, that he observed his passenger when he entered the taxi and repeatedly throughout the twelve to fifteen minute trip.12/ He also testified that he had a good opportunity to observe the Appellant during their struggle.13/

This testimony is hard to believe. It was nighttime (11:00 P.M.) when the events of the instant case occurred. The Complainant probably saw his passenger only a few seconds when he entered the cab. Furthermore, it is extremely difficult to watch someone continuously in the back seat of a cab, at night, and drive through the city. Finally, the struggle did not afford the Complainant a good opportunity to observe his assailant, for the Complainant was concentrating on other matters, i.e., saving his life.

The Appellant contends that the Complainant, remembering that his assailant had slightly peculiar ears, identified the Appellant in court because he had identified him two years previous when the police presented the Appellant to him. Therefore, the Complainant did not have an adequate basis to make the in-court identification and moreover the in-court identification was based upon the tainted out-of-court identification.

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12 / Tr. p. 12, 13.

13 / Tr. p. 17-18.

III

The Government's entire objection to Appellant's third ground of appeal is founded upon a misunderstanding of the "spontaneous exclamation" exception to the hearsay rule.

Put simply, spontaneous exclamations are occasionally admitted into evidence, subject to a variety of limitations, because they are thought to be particularly trustworthy despite their hearsay nature. The source of this trustworthiness is attributed by commentators to the violently stimulating effect of the event testified to; common examples of such events are automobile accidents and public brawls or fights. It is thought that such events produce enough shock to the nervous system of a participant or bystander to prevent him from rendering any but his immediate uncontrived reactions to the event. Wigmore speaks of the "superior trustworthiness" of such statements as the "sufficient reason"for their admission into the record.14/ He further states that the very nature of these statements creates a necessity or desirability that the court turn to them for "unbiased testimony."15/ Clearly, if the statements are in some way lacking in basic trustworthiness, or biased,

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14/ Wigmore on Evidence, §1748 (3 ed. 1940).

15/ Ibid, §1748

then the policy reasons behind the exception have not been met and the exclamation returns to the status of inadmissible hearsay.

In the present case, the exclamations were made by persons running towards the police officer, not by persons witnessing a fight. Nowhere in the record is there testimony that these two persons actually did witness the struggle, or that the officers who reported their exclamations saw them witness the struggle. In short, there is not testimony to identify them as by-standers whose statements would fall within the spontaneous exclamation rule.

Secondly, there is of necessity no connection on the record between the man they were chasing and the victim's attacker. It cannot be in any way determined from their reported utterances why they were chasing the man; he could have been running from them for any countless number of other reasons than those for which the police took him to be fleeing. There is no follow-up identification by these two pursuers after the apprehension of Appellant that would explain their reasons for chasing him or link him in any way to the attack upon the Complainant. Under such circumstances, the exclamations as reported by the police can hardly

be trustworthy enough to be admitted within the spontaneous utterance exception.

Finally, the words themselves are simply not a part of the res gestae such as to fall within the spontaneous exclamation rule. As the narration of the attack indicates, they must have been spoken a good distance away from the attack and several minutes later. They were uttered during a chase, and were directed to a third party, the police, with the obvious intention of eliciting assistance. As such, they could hardly be catagorized as immediate and uncontrived statements produced by the shock of viewing a violent event. Rather, they were accusations, deliberately directed to produce the apprehension of the man being pursued. Such uncorroborated accusation is inadmissible at trial under the spontaneous exclamation rule or any other rule.

Both cases cited by the Government as authority for the spontaneous exclamation rule actually support Appellant's argument, for in both of them the exclamation was made at the scene of the accident by one of the parties involved, i.e., the driver who had allowed his vehicle to run down a pedestrian. Identification of a dangerous criminal was not at issue. It is a mis-

take to now rely upon this doctrine and these cases to uphold the identification of a criminal by two persons who, on the record, never saw the offense attributed to him.

In addition, the Government disagrees with Appellant's application of Smith v. United States, 70 U.S. App. D.C. 255, 105 F. 2d 778 (1939), and Cannady v. United States, 132 U.S. App. D.C. 99, 351 F. 2d 796 (1965), to this case. Yet in both cases, police officers testified adversely to the defendant by relating what they had heard absent witnesses say concerning the defendant. Neither court accepted this testimony; in Smith the court allowed it to remain in the record only because the testifying officer's subsequent personal observation of the defendant's criminal activity rendered it harmless. In Cannady the court simply refused to accept such testimony, coming as it did from an absent witness and serving to severely undercut the defendant's alibi. The rationale of these cases is crystal clear. The police must produce their witnesses; they cannot be allowed to merely report at criminal trials what a certain witness told them about the defendant, without proving the credibility of that witness' story.

What happened at Appellant's trial is exactly what Cannady was concerned with. The police created a false impression that there were two strong eyewitness identifications of Appellant as the assailant in addition to the weak identification by the Complainant, and they lent further credence to their own arrest and in-court identification of Appellant by using the testimony of these absent witnesses. The effect on the jury is obvious, and crucial. Instead of receiving only the two tainted identifications by the Complainant, the jury heard the entire case in an aura of two additional, strong eyewitness identifications, and two police identifications. Yet the two "eyewitness" identifications are spurious, and the police identifications unreliable without them. Since neither of the Complainant's identifications will support the finding of guilt beyond a reasonable doubt that the Government would find in them, these additional identifications do indeed become pivotal, and their admission into evidence is clearly prejudicial enough to constitute plain error.

IV

The Government attempts to excuse the obvious inconsistencies in the testimony of its chief witness, the Complainant, by characterizing them as of minor significance and entailing minutiae which might easily be forgotten during the two years which elapsed prior to trial. However, it is clear from the transcript that

the Complainant did not know where his assailant went after their struggle. The assailant, after the struggle, did not run directly across the street into the alley as the Complainant testified,[16] but down the block.[17] It is also clear that the Complainant did not see the police apprehend the Appellant, although he testified that he did. If the Appellant was arrested at the entrance of the alley, the Complainant may have seen the arrest, but the arrest took place 100 feet into the alley and, therefore, the Complaint could not have seen it. Obviously, the struggle left the Complainant bruised, bleeding and confused.

These inconsistencies are not without significance. The Complainant's testimony significantly weakens the Government's case. It colors the reliability of the Complainant's whole testimony, especially his in-court identification.

16/ Tr. p. 21, 30.

17/ Tr. p. 48, 57, 67.

CONCLUSION

By reason of the foregoing, Appellant's conviction in the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief for Appellant has been delivered by hand to the Office of the United States Attorney this 7th day of July, 1969.

Robert N. Hickey

Robert N. Hickey

Brief for Appellant

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,590

UNITED STATES OF AMERICA, Appellee

v.

JESSIE ESSEX, Appellant

Forma Pauperis Appeal from a Judgment of the United States District Court for the District of Columbia.

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Brief for Appellant

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the admission into evidence of the out-of-court identification of Defendant by the victim was a denial to Defendant of due process of law.

2. Whether the in-court identification of Defendant by victim was so tainted by the improperly suggestive out-of-court identification, as to be inadmissible into evidence.

3. Whether the testimony of police officers regarding statements made by witnesses not present at trial was inadmissible hearsay testimony so prejudicial as to constitute plain and reversible error.

4. Whether the evidence presented at trial was sufficient to sustain the verdict of guilty.

This case has not previously been before this Court.

Brief for Appellant

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,590

JESSIE ESSEX,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Forma Pauperis Appeal From a Judgment of the United States District Court for the District of Columbia.

STATEMENT OF THE CASE

This is an appeal by Jessie Essex from a judgment and sentence upon a jury verdict of Guilty on one count of assault with a deadly weapon. The

jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291.

Chronology

Defendant Essex was arrested in an alley behind the 1100 block of M Street, Northwest, in the city of Washington, District of Columbia, on the night of October 31, 1966, by officers of the Metropolitan Police Department, Robert W. Myers and George L. Henry. After his arrest, the Government referred to the Grand Jury three counts of assault with a deadly weapon, two counts of robbery, and one count of assault with intent to commit robbery. Defendant received hospital care for injuries received during his arrest, and was detained when he could not meet bail.

On December 5, 1966, the Grand Jury indicted Defendant on 3 counts of assault with a deadly weapon, 22 D.C. Code 502; 2 counts of robbery, 22 D.C. Code 2901; and one count of assault with intent to commit robbery, 22 D.C. Code 501. Defendant entered a plea of not guilty to the indictment on December 16, 1966.

On December 29, 1966, Defendant's pro-se motion for release upon his personal recognizance was granted.

Defendant did not come to trial on these charges until September 25, 1968, due to incarceration for another offense in the District of Columbia subsequent to his release upon personal recognizance, and incarceration for another offense in Virginia.

On September 25, 1968, the Government was granted leave to drop 4 of the 6 counts in the indictment, and Defendant was then tried before a jury on one count each of assault with intent to commit robbery and assault with a deadly weapon. Defendant was found guilty of the charge of assault with a deadly weapon; when the jury could not agree upon a finding to the charge of assault with intent to commit robbery, that charge was dismissed. Defendant's motion for a Judgment of Acquittal, or, in the alternative, for a new trial, was denied upon a hearing November 8, 1968. On the same date, Defendant was sentenced to imprisonment for a period of two to six years.

Defendant was then granted leave to appeal without prepayment of costs and counsel was appointed to represent him in this Court. Defendant was confined in the Lorton Reformatory to serve his sentence.

THE TESTIMONY AT TRIAL

Summary

Mr. George H. Sweetney, a taxicab driver, testified that on the night of October 31, 1966, he picked up a fare who attempted to rob him at knifepoint. (Tr., 13-14) After a struggle the assailant escaped and ran. (Tr., 16)

Officer Robert W. Myers testified that he was proceeding to the scene of the assault when he saw one man being chased toward him by another. (Tr., 48) The fleeing man was apprehended by Officer Myers' dog. (Tr., 50) The victim was brought to the place of the apprehension and identified Defendant as the person who had assaulted him. (Tr., 50) An open knife was found in the back seat of the victim's cab. (Tr., 55)

Officer George L. Henry testified that there were two men chasing the Defendant, and that they were yelling out that he was the assailant. (Tr., 67) Both officers testified that the pursuers had volunteered statements connecting Defendant with the assault. (Tr., 61, 74-75)

Mr. George H. Sweetney

Mr. Sweetney testified as follows:

He was working as a full time cab driver on October 31, 1966, and picked up a fare at 14th and Euclid Streets, Northwest, Washington, District of Columbia. (Tr., 12-13) He identified the Defendant as the fare. (Tr., 13) When the cab reached its destination at 11th and N Streets, Northwest, the fare put a knife to Mr. Sweetney's throat and demanded his money. (Tr., 14) Mr. Sweetney resisted, and after a struggle, the fare escaped. (Tr., 16)

Mr. Sweetney stated that he observed Defendant when he turned on his cab light, and during the ride by means of his rear view mirror. He also recognized Defendant's protruding ears. (Tr., 16-18)

He testified that when the assailant escaped Sweetney continued to observe him as he ran directly across the street and into the alley where he was arrested. (Tr., 20-22) Mr. Sweetney then proceeded to the scene of arrest and identified his assailant in response to the police officer's question. (Tr., 23) He was then taken by ambulance to George Washington Hospital where he received treatment for his wounds. (Tr., 23-24) Upon returning to the precinct house, he led the police to a knife in the back seat of the cab, which knife he had wrested from his assailant. (Tr., 26)

Upon cross-examination Mr. Sweetney testified that he was never unconscious, (Tr., 29), and reaffirmed his testimony that his assailant ran directly across the street, toward 10th Street, Northwest, from where they were struggling. (Tr., 30) There was crowd of people at the alley entrance where the assailant went in, but no one tried to stop him. (Tr., 32) Mr. Sweetney stated that he saw no photographs of Defendant, and that his identification was based upon Defendant's ears. (Tr., 34-35) He

reaffirmed his on-scene identification (Tr., 36), and stated that the Defendant was apprehended just inside the entrance of the alley. (Tr., 36)

Mr. Sweetney testified that the picture of him introduced at trial was taken the next morning at the preliminary hearing (Tr., 40), and that the identity of the persons in the crowd at the alley was unknown to him. He further stated that he testified at the preliminary hearing*(Tr., 43), and that the Defendant at this hearing was the same man who had assaulted him. (Tr., 44)

Robert W. Myers

Robert Myers identified himself as a member of the Metropolitan Police Department, who had been working canine duty on the night of October 31, 1966. (Tr., 46) He stated that he was standing at 11th and M Streets, Northwest, when he was told by a passing cab that an assault was taking place at 11th and N Streets, Northwest. As he started to move up 11th Street, two men came running at him, one yelling that the other had just done something. (Tr., 47-48) The fleeing man refused to stop and entered an alley

*The Transcript of the Preliminary Hearing held in General Sessions Court on November 1, 1966 is attached hereto as Exhibit A. The Court can take judicial notice of these proceedings.

heading toward 12th Street, Northwest, where he was stopped by the officer's dog. (Tr., 49) Officer Myers identified Defendant as the man he arrested. (Tr., 50)

Officer Myers then stated that Mr. Sweetney was brought to the spot in a scout car, whereupon he identified Defendant as his assailant. (Tr., 52-53) Mr. Sweetney was badly beaten up at this time. (Tr., 54)

During a search of the vehicle, some time later at the Police Station, Officer Myers found an open knife in the rear seat of Mr. Sweetney's cab. (Tr., 55) This knife was never fingerprinted. (Tr., 56)

Upon cross-examination, Officer Myers stated that Defendant was 75-100 feet from the alley when he first saw him. (Tr., 57) He further stated that Mr. Sweetney made his identification 5 minutes after the arrest, approximately 100 feet into the alley. (Tr., 58) Officer Myers asked if the arrested man was the one responsible for Mr. Sweetney's condition, to which Mr. Sweetney replied yes. (Tr., 59-60)

He then further testified that a Mr. Tobias, the pursuer, had given him a statement connecting Defendant with the assault. (Tr., 61) He further stated that the knife had not been fingerprinted, to his knowledge, and that Mr. Sweetney did not testify at the preliminary hearing. (Tr., 63-64)

On redirect, the officer testified that he was ignorant of the whereabouts of Mr. Tobias, and had not attempted to find him (Tr., 64-65), and that a knife would not normally be fingerprinted in these circumstances.

George L. Henry

George L. Henry identified himself as a member of the Metropolitan Police Department, who was on duty on the night of October 31, 1966. (Tr., 66) He stated that he was talking to Officer Myers when the passing cab driver told them of the assault at 11th and N Streets, Northwest. (Tr., 67) He testified that two men chased another down the street toward him, yelling that he had done something. (Tr., 67) The fleeing man was arrested in an alley into which he ran, and Officer Henry identi-

fied him as the Defendant at trial. (Tr., 68) The officer further stated that Mr. Sweetney made an on-scene identification (Tr., 69-70), and that he looked very badly injured at that time. (Tr., 71)

On cross-examination, Officer Henry identified Defendant's clothing at the time of arrest, (Tr., 72-73), and stated that the alley ran from 11th to 12th Streets, Northwest. He further identified one of the pursuers as a Mr. Tobias, and stated that both pursuers gave statements to the police. (Tr., 74-75) He reaffirmed the on-scene identification by Mr. Sweetney, (Tr., 75), and stated that the pursuers and Defendant were 60 feet away from the alley when he first saw them. (Tr., 76)

Upon redirect, Officer Henry again spoke of two eyewitnesses present at the arrest, and stated that he had no idea of their current whereabouts. (Tr., 77)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 22-501 of the D. C. Code provides:

> Assault with intent to kill, rob, rape, or poison.
>
> Every person convicted of any assualt with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or willfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years.

Section 22-502 of the D. C. Code provides:

> Assault with intent to commit mayhem or with dangerous weapon.
>
> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Section 22-2901 of the D. C. Code provides:

> Robbery.
>
> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF POINTS

1. The out-of-court identification of Defendant by victim was so unnecessarily suggestive and conducive to irreparable mistaken identification that Defendant was denied due process of law.

2. The in-court identification, based upon improper out-of-court identification is not admissible into evidence because it was tainted by the illegal pre-trial identification.

3. The admission of the testimony of the police officers concerning the hearsay statements of certain witnesses, not present at trial, constitutes plain and substantial error.

4. Assuming arguendo that all the evidence at trial was properly admitted, the denial of Defendant's motion for judgment of acquittal, or in the alternative, for a new trial, was error since the evidence presented was insufficient to sustain the verdict.

SUMMARY OF ARGUMENT

ONE. The circumstances surrounding the confrontation of the Defendant by the victim, minutes after the assault, were so unnecessarily suggestive and conducive to irreparable mistaken identification that the Defendant was denied due process of law.

TWO. There is no adequate basis for the victim to make an in-court identification independent from the improper out-of-court identification. Therefore this testimony must be excluded from the evidence.

THREE. The testimony of both police officers concerning statements of absent witnesses is prejudicially inadmissible hearsay. Its admission into evidence therefore constitutes reversible plain error.

FOUR. The victim's testimony is so clearly confused and contradicted by the police testimony that it cannot sustain the verdict against the Defendant.

ARGUMENT

I.

THE OUT-OF-COURT IDENTIFICATION OF DEFENDANT BY VICTIM WAS SO UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO IRREPARABLE MISTAKEN IDENTIFICATION THAT DEFENDANT WAS DENIED DUE PROCESS OF LAW.

In connection with this argument, the attention of the Court is invited to pages 23, 36, 49 through 54, 59 through 60, 68 through 75 of the Transcript.

The Supreme Court has recognized that "the practice of showing suspects singly to persons for the purpose of identification and not as a part of a lineup has been widely condemned." 1/ The reason for this condemnation is that such confrontations may be conducted in a manner which denies a defendant due process of law. The Court has said that a denial of due process occurs when the confrontation is "unnecessarily suggestive and conducive to irreparable mistaken identification." In determining whether a confrontation is of that type, regard must be had for the total circumstances surrounding the confrontation. 2/

1/ Stovall v. Denno, 388 U.S. 293, 302 (1967).

2/ Ibid.

This Court in Russell v. United States, 3/has recently reviewed the potentiality for unfairness in the confrontation of a suspect by the victim shortly after an offense, saying:

> Unquestionably, confrontations in which a single suspect is viewed in the custody of the police are highly suggestive... Whatever the police actually say to the viewer, it must be apparent to him that they think they have caught the villain. Doubtless a man seen in handcuffs or through the grill of a police wagon looks more like a crook than the same man standing at ease and at liberty. There may also be unconscious or overt pressures on the witness to cooperate with the police by confirming their suspicions. And the viewer may have been emotionally unsettled by the experience of the fresh offense. 4/

Balancing the dangers of single-suspect confrontation with the benefits of fresh recollection, this Court concluded that as a general rule the police can immediately return " a freshly apprehended suspect to the scene of the crime for identification by one who has seen the culprit minutes before." 5/ However, in a particular case, as here, without denying the general principle of prompt identification this Court has recognized that even in such a siutation the

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3/ No. 21, 571, January 24, 1969.

4/ Id. at 6-7.

5/ Id. at 8.

particular identification at the scene may be conducted in such an unfair way that it cannot be admitted into evidence. 6/

In this case, the victim testified that he struggled with his assailant for a considerable period of time (10 to 12 minutes). As a result of the struggle and previous assault with a knife, he was badly beaten and bruised. Two police officers testified that when the victim identified the Defendant he was "bleeding, very bloody about the face and looked in real bad shape." 7/ The victim's injuries were such as to necessitate hospital treatment. 8/ It is also interesting to note that a police car was used to bring the victim to the place where the Defendant was arrested. 9/ This fact suggests that the Defendant was in poor physical condition or otherwise he could have walked to the alley where the Defendant was arrested.

When the badly injured victim arrived upon the scene of the apprehension, he was confronted with a badly beaten suspect in the custody of two policemen and two dogs.

Viewing a suspect under the conditions outlined above suggests that this situation presented an opportunity

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6/ Wise v. United States, 127 U.S. App. D.C. 279, 383 F. 2d 206, 210 (1967).

7/ Tr. p. 71; Tr. p. 54

8/ Tr. p. 24.

9/ Gen. Sess. Tr. p. 4.

and an inducement for mistaken identification. The victim, obviously hurt and upset by his experience, views a suspect surrounded by police and police dogs. There was no need for immediate identification. The victim was not in danger of death as in Stovall v. Denno, 10/ nor was the suspect still at large as in Simmons v. United States. 11/ Confrontation for the purpose of identification should not have been held at the time since the circumstances were unnecessarily suggestive and conducive to irreparable mistaken identification and thus violated Defendant's right to due process of law.

II.

THE IN-COURT IDENTIFICATION, BASED UPON IMPROPER OUT-OF-COURT IDENTIFICATION, IS NOT ADMISSIBLE INTO EVIDENCE BECAUSE IT WAS TAINTED BY THE ILLEGAL PRE-TRIAL IDENTIFICATION.

In connection with this argument, the attention of the Court is invited to pages 12 through 18 and 34 through 36 of the Transcript.

10/ Supra, note 1.

11/ 390 U.S. 377 (1968)

This Court has made it clear in Clemons v. United States, 12/ that an in-court identification of a Defendant, is admissible if there was an independent source for the identification other than the circumstances surrounding the improper out-of-court identification. Essential to this determination is whether the witness had an adequate opportunity to observe the facts leading to the in-court identification excluding the tainted out-of-court identification. From the record, it is apparent that the in-court identification took place over two years subsequent to the commission of the assault. When the victim identified the Defendant in the alley at night, the only way he could identify him was by the Defendant's protruding ears. 13/ An in-court identification, after two years, based mostly on a slight variation of someone's ears is highly unreliable. It is evident, therefore, that the in-court identification was based solely on the fact that the victim had identified the Defendant in the alley. 14/ As such the in court identification was not

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12/ No. 19,846, December 6, 1968.

13/ Tr. p. 18.

14/ Tr. p. 13.

based upon an independent source and therefore should have been excluded from admission into evidence.

III.

THE ADMISSION OF THE TESTIMONY OF THE POLICE OFFICERS CONCERNING THE HEARSAY STATEMENTS OF CERTAIN WITNESSES NOT PRESENT AT TRIAL CONSTITUTED PLAIN AND SUBSTANTIAL ERROR.

The purpose of the hearsay rule is to prohibit the use of "unsworn, uncross-examined testimony as substantive evidence in a case." 15/ In this jurisdiction, admission of such hearsay testimony has been noticed as plain error despite failure of counsel to object to its admission at trial. 16/

Testimony by a police officer involved in the investigation leading to trial becomes hearsay when it contravenes the guideline announced in Smith v. United States, 17/ that

> while an officer may testify before a jury that, acting upon information he did certain things, he may not go further and testify as to precisely what he was told about the particular place or the particular person. 18/

15/ Cannady v. United States, 122 U.S. App. D.C. 99, 351 F. 2d 796(1965).
16/ Pinkard v. United States, 99 U.S. App. D.C. 394, 240 F. 2d 632 (1957).
17/ 70 U.S. App. D.C. 255, 105 F. 2d 778 (1939).
18/ 105 F. 2d at 779.

Testimony in derogation of this rule constitutes reversible error if it is shown to be prejudicial to the Defendant, 19/ and will be noticed by the appellate courts even absent objection at trial if it constitutes plain error. 20/

On facts very similar to those found in this case, the Court has reversed upon finding that certain hearsy testimony admitted at trial was prejudicial to the accused. In Cannady v. United States, 21/ the Defendant, accused of robbery and simple assault, attempted at trial to set up an alibi defense to counter an identification by his victim. After substantial damage to the credibility of the alibi evidence had been inflicted in the early stages of the trial, the Government introduced testimony of both the arresting policeman and the victim that a companion of the Defendant at the time of his arrest had made a statement in direct contradiction to the Defendant's alibi. This companion was not present at the trial. This Court reversed the conviction, outlining its finding of prejudice in the following language:

> The fact that such testimony serves an impeaching function independent of the truth of the unsworn statement testified to does not justify its use where the content of the statement is highly prejudicial...

19/ Ibid.

20/ Fed. Rules Crim. Procedure, Rule 52(b).

21/ Supra, note 15.

> Appellee argues that we should regard this admission as harmless error, Rule 52(a), if we conclude that it was error at all. It argues that the fact that "appellant was not a truth-telling witness [had already been] made abundantly clear to the jury." Hence, any further impeaching evidence improperly admitted would not be grounds for reversal. However, it must be noted that, while appellant was not the most convincing witness, the Government's case against him was extremely thin. In such a case we are reluctant to hold that the admission of hearsay evidence substantially undercutting appellant's alibi was harmless error. If the hearsay evidence had been used to impeach appellant's credibility by showing a contradiction on some insignificant matter, we would hesitate to reverse his conviction. 22/

The facts here compel the same decision. Defendant was identified at trial two years after the incident by the victim, Mr. Sweetney, who was relying upon his on-scene identification at the time of the incident. This identification was extremely weak, by virtue of the highly suggestive circumstances of the original on-scene identification, and Mr. Sweetney's inability to offer a coherent narrative at trial. Under these circumstances, the testimony of the police officers regarding the statements of the much-quoted, but absent eyewitnesses, Tobias and Clarke, becomes crucial.

22/ 351 F. 2d at 798.

The testimony of these two missing witnesses was used by the Government to connect the Defendant with the crime, both at the trial and earlier at the preliminary hearing. Without it, in the language of Cannady, "the Government's case . . . was extremely thin." 23/ In light of these facts, it is impossible to escape the conclusion that this hearsay testimony played a significant part in Defendant's conviction, and that the conviction must therefore be reversed as the product of prejudicial, inadmissible hearsay testimony.

IV.

ASSUMING ARGUENDO THAT ALL THE EVIDENCE AT TRIAL WAS PROPERLY ADMITTED, THE DENIAL OF DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL, OR IN THE ALTERNATIVE, FOR A NEW TRIAL, WAS ERROR SINCE THE EVIDENCE PRESENTED WAS INSUFFICIENT TO SUSTAIN THE VERDICT.

In connection with this argument the attention of the Court is invited to pages 23 through 30, 35 through 45, 48 through 58 and 74 through 79 of the Transcript. A casual reading of the transcript in this case illustrates by the obvious substantial inconsistencies in testimony, the weakness of the evidence presented.

23/ 351 F. 2d at 798.

The victim testified that after his struggle with his assailant, the latter ran directly across the street (east) into an alley. 24/ However, both police officers testified that the assailant ran south on Eleventh Street approximately 60 to 100 feet where he went into an alley on the west side of Eleventh Street. 25/ It may be inferred that the victim was confused from his beating and his testimony as to subsequent events is naturally unreliable.

The victim stated that the Defendant was arrested about 5 or 10 feet into the alley. 26/ Here again his testimony varies substantially from the testimony of the police officer who stated that the Defendant was apprehended about 100 feet back in the alley. 27/

Finally the most obvious indication of the victim's confusion concerning the events of October 31, 1966, and subsequent thereto in his testimony that he identified the Defendant as his assailant at the preliminary hearing held November 1, 1966. 28/ However, Officer Myers testified, and the transcript of the preliminary hearing supports him, that the victim did not testify at the hearing. 29/

24/ Tr. p. 30.
25/ Tr. p. 57, 76.
26/ Tr. p. 36.
27/ Tr. p. 58.
28/ Tr. pp. 43 - 44.
29/ Tr. pp. 63 - 64; Gen. Sess. Tr. pp. 1-9.

It is clear therefore that the testimony of the victim upon which the Government chiefly relies is so confused that it cannot support a verdict of guilty.

CONCLUSION

For each of the reasons set forth in each of the arguments set forth herein, the conviction of Defendant Essex should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been delivered by hand to the Office of the United States Attorney this 9th day of April, 1969.

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,590

JESSIE ESSEX ,

Appellant

v.

UNITED STATES OF AMERICA ,

Appellee

Forma Pauperis Appeal From a Judgment of the United States District Court for the District of Columbia

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STATEMENT PURSUANT TO GENERAL RULE 17(c)(2)(iii)

For purposes of this appeal, Counsel deems it necessary that the Court review the following:

A.) DOCUMENTS IN RECORD ON APPEAL

1.) Indictment - December 5, 1966

2.) Judgment and Commitment - November 8, 1968

B.) REPORTER'S TRANSCRIPT

1.) General Sessions Transcript, No. US 9909-66

2.) District Court Transcript, September 25, 1968, pp. 12-83